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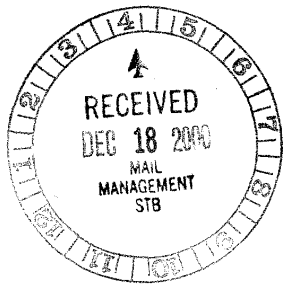
December 18, 2000



Honorable Vernon A. Williams
Office of the Secretary
Case Control Unit
Attn: STB Ex Parte No. 582
Surface Transportation Board
1925 K Street, N.W.
Washington, D.C. 20423-0001

Re: *Major Rail Consolidation Procedures*
Ex Parte 582 (Sub-No. 1)

Dear Sir:

I am enclosing an original and twenty five (25) copies of Reply Comments of the New York City Economic Development Corporation in the above-referenced proceeding. An additional copy is enclosed for date-stamp and return to our messenger. Please note that a copy of this filing is also enclosed on a 3.5 inch diskette in WordPerfect format.

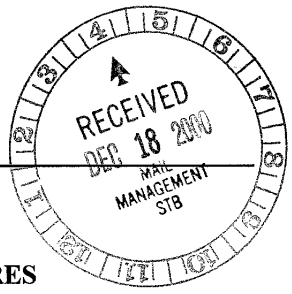
Please be advised that not all parties to this proceeding have changed the address of undersigned counsel on the service list for this proceeding. Parties continue to send pleadings to counsel's former address, despite our having filed a notice of change of address in this proceeding on August 7, 2000. By copy of this letter, counsel is asking all parties to please correct the address accordingly.

Sincerely,

Charles A. Spitulnik

Enclosure
cc: Julia M. Farr, Esquire, Surface Transportation Board
All Parties of Record

Before the
SURFACE TRANSPORTATION BOARD
Washington, D.C. 20423



Ex Parte No. 582 (Sub-No. 1)

MAJOR RAIL CONSOLIDATION PROCEDURES

REPLY COMMENTS OF THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION

The New York City Economic Development Corporation ("NYCEDC"), by its undersigned counsel, hereby submits its Reply Comments pursuant to the Order of this Board served on October 3, 2000 in this proceeding.[1] On November 17, 2000, numerous parties, including NYCEDC, served Comments regarding the NPRM. In this Reply, NYCEDC responds to two points raised by other parties to this proceeding.

1. APPLICANT CARRIERS SHOULD BE HELD ACCOUNTABLE FOR THE CONSEQUENCES OF THE TRANSACTIONS THEY UNDERTAKE.

In their comments, several of the large railroads make a common point that this Board should reject out of hand. In the discussion of the oversight process, the development of the Service Assurance Plans that would be required under proposed §1180.10 (*NPRM* at 35, 57) and the vagaries of transaction implementation, railroads beg the Board's mercy and ask to be relieved of the promises they made in their operating plans and in other documents submitted as part of their application. Citing the perfidies, unreliability and unpredictability of the market place in which they function, the railroads suggest that the Board should rely on these projections and should take all of them into account when determining the benefits of a transaction, but should not rely on them otherwise. This is not the way it should work.

[1] Ex Parte 582 (Sub-No. 1), *Major Rail Consolidation Procedures*, Notice of Proposed Rulemaking, Service Date October 3, 2000 ("NPRM").

Union Pacific Railroad Company, for example, agrees with the Board's statement in the NPRM "that merger applicants should not exaggerate the benefits of their proposed transaction and that they should be required to undertake reasonable efforts to carry out their transaction in a manner that achieves the benefits they projected." Union Pacific Railroad Company Opening Comments on Proposed Merger Rules at 15. Continuing, however, UP says that "the Board should not inflexibly require a merged carrier to carry out every element of its plans." *Id.* In a similar vein, the Association of American Railroads says in its Comments that "[t]he Board should also make clear that while it expects reasonable precision in the service assurance plans based on conditions that can be anticipated at the time of the merger application, it does not intend to lock the merged carrier into the operations described in those plans."[2]

NYCEDC asks "Why not?" It is true that no one, not even the planners, management and counsel for the nation's largest railroads, can foresee the future with precision. However, the information that applicants include in a merger application provides most of the information that this Board and affected parties can use to begin understanding whether a proposed transaction is "consistent with the public interest." 49 U.S.C. §11324(c). Supplemented by the Service Assurance Plan the Board proposes to require applicants to include, third parties can begin to develop an understanding of what impact the transaction will have, whether positive or negative. Discovery, too, provides further data. Of course each party can perform its own analyses, but this must begin with the description of the transaction the applicants propose. The understanding of potential responses to it must begin there as well.

Each party then has a choice - - support the transaction, oppose it and seek conditions to ameliorate any adverse impacts it may bring, or remain silent. Each of those choices bears consequences, and each party is relying heavily on the applicants' projections to make them.

[2] *See also* Comments of Norfolk Southern in Response to Notice of Proposed Rulemaking at 43 – 44.

And why should this Board not hold the carriers involved in a transaction to their promises, and why should the applicants not be required to compensate affected parties for the damage they cause? Third parties to the transaction are not responsible for the applicants' inability to predict the future. Nor are these innocent bystanders the source of the problem. It is true that changes in the market that are totally independent of the merger once implemented may trigger service or other problems for third parties. However, too often the applicants in a rail merger are the ones who are responsible for the impacts being experienced by the third parties, be they other railroads, shippers, commuter railroads and their customers, or others. Applicant carriers should be held accountable for their projections and responsible for the consequences of their actions.

2. THE BOARD NOW HAS, AND SHOULD CONTINUE TO EXERCISE, THE AUTHORITY TO IMPOSE NEW CONDITIONS ON CONSUMMATED MERGERS

UP's comments misstate the scope of the Board's authority to impose conditions on a transaction after its implementation. The current statute and regulations leave no doubt that carriers implementing transactions undertake their implementation in the context of taking a risk that the Board will impose further conditions when a third party is experiencing harm as a result.

UP states that "the Board cannot impose new regulations *and conditions* on consummated mergers" UP Comments at 6 (emphasis added). Citing *Landgraf v. USI Film Products,* 511 U.S. 244, 280 (1994), UP also states that "retroactive application of new rules 'would impair the rights a party possessed when he acted, increase a party's liability for past conduct, or *impose new duties with respect to transactions already complete.*'" *Id.* (emphasis added by UP). Finally, UP asserts that "[t]he Board must identify all necessary conditions when it considers a proposed transaction so that the parties can understand what will be required of them when they decide to consummate." *Id.*

While the thrust of UP's discussion of this issue focuses on disagreement with the concept of addressing the impact of future, unknown mergers in the context of a pending case that is known and described, its assertions misstate the extent of the STB's authority under current law and regulations. Contrary to UP's assertions, Congress has specifically given the STB the authority to change the terms of its approval of a transaction even following implementation. The statute permits the Board:

> [A]t any time on its own initiative because of material error, new evidence or substantially changed circumstances [to] –
>
> (1) reopen a proceeding;
>
> (2) grant rehearing, reargument or reconsideration of an action of the Board; or
>
> (3) change an action of the Board.

49 U.S.C. §722(b). The Board's regulations implement this authority, permitting any person to seek to reopen an administratively final action of the Board upon a showing of "material error, new evidence or substantially changed circumstances." 49 C.F.R. §1115.4.

What is the purpose of the creation of this remedy, if not to permit the Board to require carriers to fix problems their transaction has created? The statute and the implementing regulation specifically look to changed circumstances and new evidence as the reasons to reopen. If the law gives the right to a remedy, the remedy must have some meaning. The remedy of reopening has meaning only if the Board has the authority, once the transaction is reopened, to fix the problem that has been identified. Carriers undertake implementation of approved transactions of all types with notice at least, if not actual knowledge, of the very real possibility that the Board can reopen and add a new condition to address the situation that the petitioning party has identified.

NYCEDC takes no issue with UP's recitation of courts' typical reluctance to look with favor on the retroactive application of new regulations. However, that reluctance should not be

understood to limit the STB's clearly granted statutory authority to reopen a consummated merger to require carriers to implement new conditions that address adverse circumstances their own actions have created.

CONCLUSION

The proposed revision to the merger procedures has drawn a host of suggestions about revisions that will bring the rules into line with the needs and interests of the segment of the affected market in which the commenters participate. NYCEDC has filed such comments previously, and continues to assert that the Board's rules and the public could benefit from the changes it has previously suggested. For the most part, the proposed rules accomplish an important public objective, that is, of requiring applicants in a merger proceeding to acknowledge and take more care to address the interests of the elements of the public who will be affected by a transaction they propose. NYCEDC continues to support that direction and, with the changes proposed in its initial Comments as supplemented by this Reply, endorses amendment of the merger procedures as set forth in the October 3 NPRM.

Dated: December 18, 2000

Respectfully submitted,

Charles A. Spitulnik
McLeod, Watkinson & Miller
One Massachusetts Avenue, N.W.
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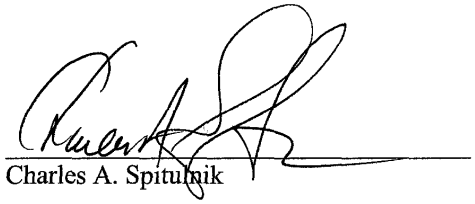
Washington, D.C. 20001
(202) 842-2345
Counsel for the New York City Economic Development Corporation

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of December, 2000, a copy of the Reply Comments of the New York City Economic Development Corporation was served by first class mail, postage pre-paid upon all Parties of Record.



Charles A. Spitulnik